

VIENNA CONVENTION ON SUCCESSION OF STATES IN RESPECT OF TREATIES

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In 1967, the International Law Commission ('the Commission') began work on the subject of succession of States in respect of treaties. In 1974, the Commission submitted to the United Nations General Assembly a final set of draft articles on Succession of States in respect of Treaties with a recommendation that the Assembly should convene a conference of plenipotentiaries to study the draft articles and conclude a convention on the subject. The General Assembly adopted resolutions 3496 (XXX) of 15 December 1975 and 31/18 of 24 November 1976 to this effect by which it accordingly decided that the draft articles should be considered by a United Nations Conference on Succession of States in respect of Treaties ('the Conference') to be held at Vienna from 4 April to 6 May 1977.

The Conference was held as scheduled but partly because the draft articles raised some controversial issues it recommended that the General Assembly decide to reconvene the Conference in the first half of 1978 for a final session. The resumed session of the Conference, approved by General Assembly resolution 32/47 of 8 December 1981, was held at Vienna from 31 July to 23 August 1978 and resulted in the adoption of the 1978 Vienna Convention on Succession of States in respect of Treaties ('the 1978 Convention').

Given the subject matter, there was no question of the 1978 Convention being based on the very successful 1969 Vienna Convention on the Law of Treaties ('the 1969 Convention'). Instead, the Commission decided to deal with the subject as a question of succession. However, in appointing Sir Humphrey Waldock as the first Special Rapporteur (he had previously been its Special Rapporteur for the law of treaties), the Commission's method of work would follow the pattern set by the elaboration of the draft articles on the law of treaties which eventually became the 1969 Convention. In 1973, Sir Francis Vallat succeeded Waldock for the last year of the Commission's work on the subject.

The 1978 Convention did not enter into force until 1996 when it achieved the necessary fifteen expressions of consent to be bound. This was almost eighteen years after its adoption. Entry into force only happened because, between 1991 and 1996, Bosnia and Herzegovina, Croatia, Estonia, Slovakia, Slovenia, the former Yugoslav Republic of Macedonia and Ukraine acceded or succeeded to the 1978 Convention. Not surprisingly, as new States they presumably thought it would be useful to them. Estonia is included as a new State even though it resumed its previous statehood. However, since it had been for fifty years *de facto* part of the Soviet Union, it had to resolve succession problems of some novelty. Although Byelorussia (now Belarus) and Ukraine had been part of the Soviet Union, as the result of a political deal involving also India (which became independent only in 1947) all three became founding Members of the United Nations. Yet, the former Soviet republics also had their own succession problems (on the particular treaty succession problems of Estonia, and Belarus and Ukraine, see A. Aust, *Modern Treaty Law and Practice*, 2nd ed., Cambridge, Cambridge University Press, 2007, pp. 377-8 and 376-7, respectively). Today, the 1978 Convention has but twenty-two parties, the most recent being the Republic of Moldova. So, why has the 1978 Convention not been more successful?

The so-called Cold War was still an important factor when the 1978 Convention was adopted. As a consequence, some of the draft articles were adopted by separate votes. In addition, there was no general doctrine which resolved the problems of succession to treaties. In particular, the situations in which new States are created vary enormously, and a “one-size fits all” approach was quite unsuitable. The number of different theories of succession did not make the task of devising a text on the subject any easier. As a result, the 1978 Convention contains much that is contentious progressive development of international law. When the Commission was developing its draft articles (in the relatively short space of seven years) the most recent State practice related to former colonies but was not consistent. Consequently, those rules of the 1978 Convention which are concerned with newly independent States are excessively complex. They also give undue prominence to the so-called “clean slate” principle, and not enough weight to the abundant State practice of concluding devolution agreements or, even more importantly, making declarations of succession. Moreover, decolonisation was almost at its end by 1978, and, unless a successor State agrees otherwise, the 1978 Convention does not apply to a succession of States which occurs before its entry into force (6 November 1996).

Nor did the 1978 Convention’s rules about the break-up of States reflect modern State practice, in particular the great variety of situations occurring at the end of the twentieth century. The reunification of Germany took place in 1990. The break-up of the Soviet Union occurred in 1991, and of Yugoslavia mainly between 1992 and 1993. The so-called velvet divorce of Czechoslovakia happened in 1993. In short, before the 1990s there was little of recent practice on which to draw.

Although parts of the 1978 Convention may have been relied upon in drafting certain bilateral succession agreements – an example in point being the strong endorsement of article 34(1) (Succession of States in cases of separation of parts of a State) in the practices of the successor States to the former Czechoslovakia – its influence and practical value is likely to continue to be considerably less than that of the 1969 Convention. Notwithstanding the reference by the Arbitration Commission of the Conference for Peace in Yugoslavia (also known as the ‘Badinter Commission’) in its Opinions Nos. 1 and 9 to the 1978 Convention as embodying principles of international law, article 34 cannot necessarily be taken as reflecting customary international law.

Although the 1978 Convention is an example of progressive development of international law, the customary rules of international law on succession of States in respect of treaties apply to most States, yet they are not reflected in the text of the 1978 Convention. Therefore, it is not a reliable guide to such rules of customary law on treaty succession. Yet, albeit its late entry into force, practice following the end of the Cold War and decisions of the International Court of Justice may now have breathed a little life into a few of its provisions (see *Application of the Genocide Convention (Bosnia and Herzegovina v. Yugoslavia)*, *I.C.J. Reports 1996*, pp. 595 and 611-12 and *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *I.C.J. Reports 1997*, pp. 7 and 72). But, they are unlikely to result in many States wanting now to be parties to the 1978 Convention. So, it may remain little more than an interesting historical document.

Related Materials

A. Jurisprudence

Arbitration Commission of the Conference for Peace in Yugoslavia ('Badinter Commission'), *Opinion No. 1 on Questions Arising from the Dissolution of Yugoslavia* (reproduced in *International Legal Materials*, vol. 31 (1992), p. 1497).

Arbitration Commission of the Conference for Peace in Yugoslavia ('Badinter Commission'), *Opinion No. 9 on Questions Arising from the Dissolution of Yugoslavia* (reproduced in *International Legal Materials*, vol. 31 (1992), p. 1523).

International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, (Bosnia and Herzegovina v. Yugoslavia) Judgment, I.C.J. Reports 1996*, p. 595.

International Court of Justice, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7.

B. Documents

Report of the International Law Commission on the work of its twenty-sixth session, 6 May - 26 July 1974, Official Records of the General Assembly, Twenty-ninth session, Supplement No. 10 (A/9610/Rev.1, reproduced in *Yearbook of the International Law Commission, 1974*, vol. II (Part One), chapter II.)

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General Assembly resolution 31/18 of 24 November 1976 (United Nations Conference on Succession of States in respect of Treaties).

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C. Doctrine

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D. P. O'Connell, *The Law of State Succession*, Cambridge, Cambridge University Press, 1956.

J. Klabbers, M. Koskenniemi, O. Ribbelink and A. Zimmermann (eds.), *State Practice Regarding State Succession and Issues of Recognition: the Pilot Project of the Council of Europe*, (on behalf of Erik Castrén Institute of International law and Human Rights, Finland, T.M.C. Asser Institute, The Netherlands, Max Planck Institute for Comparative Public Law and International Law, Germany), The Hague, London, Boston, Kluwer Law International, 1999.

M. Shaw, *International Law*, 6th ed., Cambridge, Cambridge University Press, 2008, pp. 966-984.

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